

AMENDED IN SENATE JUNE 1, 2006

CALIFORNIA LEGISLATURE—2005–06 REGULAR SESSION

ASSEMBLY BILL

No. 2038

Introduced by Assembly Member Tran

February 14, 2006

An act to amend Sections 17310, 17314.1, ~~17331~~, and 17331.2 of the Financial Code, relating to escrow agents.

LEGISLATIVE COUNSEL'S DIGEST

AB 2038, as amended, Tran. Escrow agents.

The Escrow Law provides for licensing and regulation of escrow agents, other than certain exempt persons, by the Commissioner of Corporations. Existing law requires licensees to apply for membership in the Escrow Agents' Fidelity Corporation, a nonprofit mutual benefit corporation, which is established to indemnify its members against loss of trust obligations, which indemnification may be accomplished through a fund established by the corporation or a fidelity bond or insurance policy approved by the commissioner or a combination thereof. Existing law requires a Department of Justice background check relative to each employee, shareholder, or other person to be compensated by a member of Fidelity Corporation and provides for the corporation to deny the application or suspend or revoke the certificate of that person on specified grounds, including criminal convictions for certain financial crimes.

This bill would require Fidelity Corporation to provide a copy of the fidelity bond or insurance policy, if any, to all members and to the commissioner. ~~The bill would require the commissioner to provide Fidelity Corporation with a copy of the Department of Justice background check report prepared for each employee, shareholder, or~~

~~other compensated person of the member.~~ The bill would define conviction for purposes of application denial or certificate revocation, and would, *under certain conditions*, require, rather than authorize, the corporation to suspend the certificate ~~under certain conditions~~. The bill would make other related changes.

Vote: majority. Appropriation: no. Fiscal committee: yes.

State-mandated local program: no.

The people of the State of California do enact as follows:

1 SECTION 1. Section 17310 of the Financial Code is
2 amended to read:

3 17310. (a) It shall be the purpose of Fidelity Corporation to
4 indemnify a member within the State of California against loss,
5 subject to the limitations set forth in this chapter.

6 (b) Fidelity Corporation shall not be liable for any
7 consequential damages sustained by a member, or by any other
8 person, nor for any punitive damages whatsoever.

9 (c) The indemnification shall be provided by any of the
10 following:

11 (1) A fund established by Fidelity Corporation pursuant to
12 Section 17320.

13 (2) A fidelity bond or insurance policy to be approved by the
14 commissioner.

15 (3) A combination of paragraphs (1) and (2) subject, however,
16 to the maximum coverage specified in subdivision (b) of Section
17 17314.

18 (d) Fidelity Corporation shall provide a copy to all of its
19 members and the commissioner of the fidelity bond or insurance
20 policy as it is acquired or renewed, and Fidelity Corporation shall
21 promptly provide a copy to any member or successor in interest,
22 upon request.

23 SEC. 2. Section 17314.1 of the Financial Code is amended to
24 read:

25 17314.1. (a) Notwithstanding any other provision of this
26 article, Fidelity Corporation shall not be obligated to pay any
27 claim made by a member unless (1) the claim would, except for
28 the dollar amount thereof, be a valid claim under the bond as
29 prescribed by Section 17203.1 and (2) the claim is made within
30 the time prescribed by Section 17205. The protection to members

1 provided by Fidelity Corporation and by the fidelity bond or
2 insurance policy, if any, shall therefore be deemed to be
3 coextensive except as to the dollar amounts as set forth in Section
4 17314. All defenses available to the insurer under the fidelity
5 bond or insurance policy, if any, on any claim shall also be a
6 defense to Fidelity Corporation, as either an indemnitor or surety,
7 on any claim brought against the corporation.

8 (b) No person other than a member, or the member's successor
9 in interest, who shall be the commissioner, a conservator,
10 receiver, or trustee as designated by a court of competent
11 jurisdiction, is entitled to assert a claim against Fidelity
12 Corporation for losses covered under this article.

13 ~~SEC. 3. Section 17331 of the Financial Code is amended to~~
14 ~~read:~~

15 ~~17331. (a) An applicant applying for licensure as an escrow~~
16 ~~agent under this division is required to apply for a Fidelity~~
17 ~~Corporation Certificate, prepared and issued by Fidelity~~
18 ~~Corporation, for each proposed shareholder, officer, director,~~
19 ~~trustee, manager, or employee who is to be directly or indirectly~~
20 ~~compensated by the escrow agent, prior to licensure of the~~
21 ~~escrow agent by the commissioner.~~

22 ~~(b) A shareholder, officer, director, trustee, manager, or~~
23 ~~employee of an escrow agent, directly or indirectly compensated~~
24 ~~by an escrow agent within this state, is required to complete and~~
25 ~~execute a Fidelity Corporation Certificate application, prepared~~
26 ~~and issued by Fidelity Corporation, as a condition of his or her~~
27 ~~employment or entitlement to compensation, before the person~~
28 ~~may continue the regular discharge of his or her duties, or have~~
29 ~~access to moneys or negotiable securities belonging to or in the~~
30 ~~possession of the escrow agent, or draw checks upon the escrow~~
31 ~~agent or the trust funds of the escrow agent.~~

32 ~~(c) Fidelity Corporation Certificates may also be known as~~
33 ~~Escrow Agent's Fidelity Corporation Certificates or EAFC~~
34 ~~Certificates. The certificate at all times remains the property of~~
35 ~~Fidelity Corporation, and is not transferable by either a member~~
36 ~~or employee. The certificate is not a warranty or guarantee by~~
37 ~~Fidelity Corporation of the integrity, veracity, or competence of~~
38 ~~the person.~~

39 ~~(d) An application for a Fidelity Corporation Certificate shall~~
40 ~~be in writing and in the form prescribed by Fidelity Corporation.~~

1 The application may include (1) a fee not to exceed fifty dollars
2 (\$50), (2) two passport-size photographs, and (3) a set of
3 fingerprints on the form established by the Department of Justice
4 for requesting state summary criminal history information, plus
5 the fee charged by the Department of Justice for processing
6 noncriminal applicant fingerprints. The Department of Justice
7 shall honor the Fidelity Corporation report request form and issue
8 a report to Fidelity Corporation, notwithstanding any other
9 provision of law or regulation to the contrary. Fidelity
10 Corporation is also entitled to submit a set of fingerprints on the
11 specified noncriminal applicant fingerprint form for the purpose
12 of requesting and obtaining a report from the Department of
13 Justice, for the officers and employees of Fidelity Corporation. A
14 member shall cause the filing of applications for all existing
15 employees as required by this section within 30 days of written
16 notice by Fidelity Corporation to the member. The commissioner
17 shall provide Fidelity Corporation a copy of the Department of
18 Justice report in the commissioner's possession for any applicant
19 within five days of the written request of Fidelity Corporation, if
20 the applicant's Department of Justice report is received only by
21 the commissioner.

22 (e) The application form shall include a provision for binding
23 arbitration to allow for arbitration of any appeal or dispute as to a
24 decision by Fidelity Corporation concerning the certificate, as
25 follows:

26 A DISPUTE AS TO WHETHER THE DENIAL OF THIS
27 CERTIFICATE APPLICATION OR ANY SUBSEQUENT
28 SUSPENSION OR REVOCATION OF THE CERTIFICATE IS
29 UNNECESSARY OR UNAUTHORIZED OR WAS
30 IMPROPERLY, NEGLIGENTLY, OR UNLAWFULLY
31 RENDERED, MAY BE DETERMINED BY SUBMISSION TO
32 ARBITRATION AS PROVIDED BY CALIFORNIA LAW,
33 AND NOT BY A LAWSUIT OR RESORT TO COURT
34 PROCESS EXCEPT AS CALIFORNIA LAW PROVIDES FOR
35 JUDICIAL REVIEW OF ARBITRATION PROCEEDINGS OR
36 EXCEPT AS PROVIDED BY SECTION 17331.3 OF THE
37 FINANCIAL CODE. THE APPLICANT MAY, SUBJECT TO
38 AGREEMENT, SUBMIT ANY ISSUE ARISING FROM A
39 DECISION BY FIDELITY CORPORATION TO DENY THIS
40 CERTIFICATE APPLICATION OR TO SUSPEND OR

1 ~~REVOKE THE CERTIFICATE TO BE DECIDED BY~~
2 ~~BINDING NEUTRAL ARBITRATION. UPON AN~~
3 ~~AGREEMENT TO SUBMIT TO BINDING NEUTRAL~~
4 ~~ARBITRATION, THE APPLICANT HAS NO RIGHT TO~~
5 ~~HAVE ANY DISPUTE CONCERNING THIS CERTIFICATE~~
6 ~~APPLICATION LITIGATED IN A COURT OR JURY TRIAL~~
7 ~~NOR ANY JUDICIAL RIGHTS TO DISCOVERY AND~~
8 ~~APPEAL, EXCEPT AS SPECIFICALLY PROVIDED IN THE~~
9 ~~ESCROW LAW. ARBITRATION MAY BE COMPELLED AS~~
10 ~~PROVIDED BY LAW.~~

11 (f) ~~There is no liability on the part of and no cause of action of~~
12 ~~any nature may arise against Fidelity Corporation or its members,~~
13 ~~directors, officers, employees, or agents, the State of California,~~
14 ~~the Department of Corporations, or any officer, agent, or~~
15 ~~employee of the state or the Department of Corporations for~~
16 ~~statements made by Fidelity Corporation in reports or~~
17 ~~recommendations made pursuant to this division, or for reports or~~
18 ~~recommendations made pursuant to this division to Fidelity~~
19 ~~Corporation by its members, directors, officers, employees or~~
20 ~~agents, the State of California, the Department of Corporations,~~
21 ~~or any officer, agent, or employee of the state or the Department~~
22 ~~of Corporations, unless the information provided is false and the~~
23 ~~party making the statement or providing the false information~~
24 ~~does so with knowledge and malice. Reports or recommendations~~
25 ~~made pursuant to this section, or Section 17331.1, 17331.2, or~~
26 ~~17331.3 are not public documents.~~

27 (g) ~~There is no liability on the part of and no cause of action of~~
28 ~~any nature may arise against Fidelity Corporation or its members,~~
29 ~~directors, officers, employees, or agents, the State of California,~~
30 ~~the Department of Corporations, or an officer, agent, or~~
31 ~~employee of the state or the Department of Corporations for the~~
32 ~~release of any information furnished to Fidelity Corporation~~
33 ~~pursuant to this section unless the information released is false~~
34 ~~and the party, including Fidelity Corporation, its members,~~
35 ~~directors, officers, employees, or agents, the state, the~~
36 ~~Department of Corporations, or any officer, agent, or employee~~
37 ~~of the state or the Department of Corporations, who releases the~~
38 ~~false information does so with knowledge and malice.~~

39 (h) ~~There is no liability on the part of and no cause of action of~~
40 ~~any nature may arise against Fidelity Corporation or its directors,~~

1 officers, employees, or agents, for any decision to deny an
2 application for a certificate or to suspend or revoke the certificate
3 of any person or for the timing of any decision or the timing of
4 any notice to persons or members thereof, or for any failure to
5 deny an application under subdivision (a) of Section 17331.2.
6 This subdivision does not apply to acts performed in bad faith or
7 with malice.

8 (i) Fidelity Corporation, any member of Fidelity Corporation,
9 an agent of Fidelity Corporation or of its members, or any person
10 who uses any information obtained under this section for any
11 purpose not authorized by this chapter is guilty of a
12 misdemeanor.

13 (j) Section 17331, 17331.1, or 17331.2 does not constitute a
14 restriction or limitation upon the obligation of Fidelity
15 Corporation to indemnify members against loss, as provided in
16 Sections 17310 and 17314. The failure to obtain a certificate, the
17 denial of an application for a certificate, or the suspension,
18 cancellation, or revocation of a certificate does not limit the
19 obligation of Fidelity Corporation to indemnify a member against
20 loss.

21 (k) As of January 1, 1992, notwithstanding Section 11105 of
22 the Penal Code, Fidelity Corporation is entitled to receive state
23 summary criminal history information and subsequent arrest
24 notification from the Department of Justice as a result of
25 fingerprint cards submitted to the Department of Justice by the
26 Department of Corporations, pursuant to subdivision (g) of
27 Section 17209, Section 17212.1, and subdivision (d) of Section
28 17414.1, by or on behalf of escrow agents, shareholders, officers,
29 directors, trustees, managers, or employees of an escrow agent,
30 directly or indirectly compensated by an escrow agent. The
31 Department of Justice and Fidelity Corporation shall enter into an
32 agreement to implement this subdivision. The Department of
33 Corporations shall forward to Fidelity Corporation, weekly, a list
34 of names of individual fingerprints submitted to the Department
35 of Justice.

36 ~~SEC. 4.~~

37 *SEC. 3.* Section 17331.2 of the Financial Code is amended to
38 read:

1 17331.2. (a) Fidelity Corporation shall deny the application
2 for a certificate or revoke the certificate of any person, upon any
3 of the following grounds:

4 (1) The application contains a material misrepresentation of
5 fact or fails to disclose a material fact so as to render the
6 application false or misleading, or if any fact or condition exists
7 which, if it had existed at the time of the original application for
8 a certificate, reasonably would have warranted Fidelity
9 Corporation to refuse originally to issue that certificate.

10 (2) That the person has been convicted of a crime or offense,
11 whether a felony, an offense punishable as a felony, or a
12 misdemeanor, ~~which~~ *that* involved dishonesty, fraud, deceit,
13 embezzlement, fraudulent conversion, misappropriation of
14 property, or any other crime reasonably related to the
15 qualifications, functions, or duties of a person engaged in
16 business in accordance with this division. A conviction within
17 the meaning of this section is a plea or verdict of guilty or a
18 conviction following a plea of nolo contendere. A conviction also
19 includes an order granting probation and suspending the
20 imposition of sentence, notwithstanding a subsequent order
21 pursuant to ~~Sections~~ *Section* 1203.4 or 1203.4a of the Penal Code
22 permitting the person to withdraw his or her plea of guilty and to
23 enter a plea of not guilty, or setting aside the verdict of guilty, or
24 dismissing the accusation, information, or indictment. If,
25 however, the conviction is more than 10 years old, or the
26 conviction has been expunged, or the person has obtained a
27 certificate of rehabilitation or relief under Section 1203.4 or
28 1203.4a of the Penal Code, or if the conviction was an infraction,
29 then the person may have a Fidelity Corporation certificate upon
30 showing by clear and convincing proof to a reasonable certainty
31 that the conviction is no longer reasonably related to the
32 qualifications, functions, or duties of a person engaged in
33 business in accordance with this division or that person's
34 employment with a member.

35 (3) That the person has been held liable in a civil action by
36 final judgment of any court if the judgment involved dishonesty,
37 fraud, deceit, embezzlement, fraudulent conversion, or
38 misappropriation of property or the person has been ordered to
39 make restitution to a victim in any criminal case involving a
40 crime or offense set forth in paragraph (2). The person may have

1 a Fidelity Corporation certificate upon showing by clear and
2 convincing proof to a reasonable certainty that the judgment or
3 restitution order is no longer reasonably related to the
4 qualifications, functions, or duties of a person engaged in
5 business in accordance with this division or that person's
6 employment with a member.

7 (4) That the person has (A) committed or caused to be
8 committed an act which caused any member to suffer a loss; (B)
9 committed or caused to be committed or colluded with any other
10 person committing any act which caused a loss, for which
11 Fidelity Corporation or the insurer on any insurance policy or
12 fidelity bond purchased by Fidelity Corporation, or both, to
13 become liable to indemnify any member; or (C) committed or
14 caused to be committed an act of dishonesty, fraud, deceit,
15 embezzlement, fraudulent conversion, or misappropriation of
16 property, to the material damage of a member or for which the
17 member has been held liable to any third party, by final
18 judgment.

19 (5) That the person has been barred from employment by final
20 order of the commissioner pursuant to Section 17423.

21 (6) That the person has been deemed not qualified to serve in
22 any capacity as a director or officer or in any other position
23 involving management duties with a financial institution,
24 pursuant to Division 1.8 (commencing with Section 4990).

25 (7) That the person has been denied coverage or reinstatement
26 by any insurer under any fidelity bond or crime policy, unless a
27 decision of reinstatement of coverage has been made after that
28 denial. A person who obtained a decision of reinstatement of
29 coverage prior to the effective date of this section may have a
30 Fidelity Corporation certificate notwithstanding paragraphs (2)
31 and (3) of this subdivision, unless any other ground for denial or
32 revocation applies to that person.

33 (b) Fidelity Corporation shall suspend the certificate of any
34 person upon either of the following grounds:

35 (1) That the person has been censured or suspended from any
36 position of employment by final order of the commissioner. The
37 certificate suspension shall be for a term concurrent with the final
38 order of the commissioner.

39 (2) That the person has been barred from any position of
40 employment or management or control of any escrow agent, for

1 a term of less than permanent, by final order of the
2 commissioner. The certificate suspension shall be for a term
3 concurrent with the final order of the commissioner.

4 (c) Fidelity Corporation may suspend the certificate of any
5 person under either of the following grounds:

6 (1) That there is an action commenced by the commissioner to
7 either suspend or bar that person, under Section 17423.

8 (2) That any member with whom the person was employed has
9 given a proof of loss or a notice of an occurrence which may give
10 rise to a claim for a loss of trust obligations either of which
11 identifies the person as the person responsible for the loss or as a
12 person acting in collusion with the person causing the loss.

13 (d) Upon denial of an application for, or upon suspension or
14 revocation of the certificate of any person, Fidelity Corporation
15 shall provide written notice to the member with whom that
16 person is employed of the decision, pending any appeal
17 therefrom which might be made. Thereafter, the member shall
18 not allow that person to have access to money or negotiable
19 instruments or securities belonging to or in the possession of the
20 escrow agent, or to draw checks upon the escrow agent or the
21 trust accounts of the escrow agent, but that person may otherwise
22 continue in the performance and discharge of other duties of an
23 employee. Fidelity Corporation shall notify the person in writing
24 of the decision to deny, suspend, or revoke the certificate and of
25 the person's right of appeal, together with the notice of appeal.
26 The grounds and basis for the decision shall be stated in the
27 notice thereof. All notices may be served either personally or by
28 mail, properly addressed to the address of record for the member
29 and the person.

30 (e) Any person whose application for a certificate has been
31 denied, or whose certificate has been suspended or revoked, may
32 appeal the decision, as provided in Section 17331.3. While that
33 appeal is pending, the person may not have access to money or
34 negotiable instruments or securities belonging to or in the
35 possession of the escrow agent, or to draw checks upon the
36 escrow agent or the trust accounts of the escrow agent, but that
37 person may otherwise continue in the performance and discharge
38 of other duties of an employee pending final decision of that
39 person's appeal. Failure to remove the person whose application
40 has been denied, or whose certificate has been suspended or

1 revoked, as a signer on the trust accounts may be subject to
2 action by the commissioner as provided for in this division and
3 shall be subject to penalties as set forth in Section 17331.1.
4 (f) Upon expiration of the time for an appeal, or upon
5 conclusion of the appeal, the decision to deny an application for
6 or to suspend or revoke the certificate of any person shall become
7 final. Fidelity Corporation shall give written notice to the
8 member and to the person of the final decision within 10 days.
9 Thereafter, Fidelity Corporation shall disclose in writing to all
10 members the identity of persons whose application has been
11 denied or whose certificate has been revoked.

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